

# Quarterly Focus: Trump's second roll of the antitrust dice



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**Donald Trump has been talking a big game when it comes to antitrust enforcement under his second administration. CDR asks what the reality might look like.**

As the US readies itself for Trump 2.0, with the controversial figure officially taking his seat as the 47<sup>th</sup> president of the United States today (20 January), expectations are high that antitrust policy will form an integral part of his second administration. This expectation was fomented when, just a few weeks after securing his victory in November, President Trump wasted little time in announcing his nominees to lead the two primary antitrust enforcement agencies, endorsing experienced competition lawyer **Gail Slater** as leader of the **Department of Justice** (DoJ)'s Antitrust Division and announcing that he will promote **Federal Trade Commission** (FTC) commissioner **Andrew Ferguson** to Chair of the agency.

The nominations were accompanied by bullish statements that suggested he would pull no punches when it comes to antitrust matters. Posting on his *Truth Social* account on 10

December, Trump proclaimed that Ferguson was well versed in “standing up to Big Tech censorship, and protecting freedom of speech in our great country”, and would “fight on behalf of the American people on day one of my administration”.

Six days earlier, Trump slammed Big Tech on the same social media platform for “run[ning] wild for years, stifling competition in our most innovative sector”, adding that he was “proud to fight these abuses” in his first term.

Despite these potent proclamations, leading antitrust lawyers tell *CDR* that a more measured and restrained approach could be on the horizon following Biden’s reign, although Big Tech, healthcare and the procurement sector are set for some heavy scrutiny.

## SIGNIFICANT SHIFT

Washington, DC-based **Jon Dubrow**, partner and US head of **McDermott Will & Emery’s** antitrust group, expects a significant shift in how Trump handles antitrust matters compared to the Biden administration, which is destined to be remembered for its aggressive rhetoric and actions including implementing policies that were overtly hostile to mergers and acquisitions. “I expect that will be significantly curtailed in the Trump administration. That does not mean by any stretch that it will be an ‘anything goes’ environment, but I expect that the FTC and DoJ will deploy more traditional types of analyses and standards than we have seen in the last four years. I see a big shift from the Biden antitrust approach, with more of a reversion towards more traditional approaches we had seen for several decades prior to Biden,” Dubrow comments.

**Anthony Swisher**, a partner at **Baker Botts’** Washington, DC office, believes the first Trump administration provides a reasonable prediction of what the second term might look like. “Trump’s picks to head the FTC and DoJ Antitrust Division are – like in the first administration – well within the mainstream of antitrust enforcement. I expect enforcement will continue, but I expect it to be more measured and with a greater focus on economic analysis, rather than a concern over ‘bigness’ for its own sake. Certainly, I expect less bellicose rhetoric from the agencies than we’ve seen over the past four years,” Swisher states.

## ROLLING BACK BIDEN POLICIES



For many observers, competition enforcement under Biden had gone beyond the traditional parameters of antitrust – a phenomenon that some anticipate will come to a halt once Trump gets his feet back under the table. **Eric Grannon**, Washington, DC-based partner at **White & Case**, explains: “For example, the FTC’s non-compete rule [which bans most non-compete clauses in employment agreements] has been quite controversial and is being [litigated in the US](#). Also, there has been an increasing focus on labour and employment concerns. I think we will see either a complete reversal of that, or just exponentially less attention on these areas under Trump, with a return to a focus on the consumer welfare standard.”

**David Schwartz**, partner at **Bryan Cave Leighton Paisner** forecasts a slow start for antitrust enforcement before picking up in the autumn and winter of 2025, because both Slater and proposed FTC commissioner **Mark Meador** require Senate confirmation. “In the first Trump administration, it took eight months for Trump’s nominee for the Antitrust Division head to get confirmed; Biden’s nominee for the same role took 10 months,” Schwartz points out, adding: “On the FTC side, Meador’s confirmation is even more important because until he is in place, the FTC will likely have a 2-2 split between Democrats and Republicans, even though Trump will be able to immediately appoint Andrew Ferguson as chair. But that split will prevent the incoming chair from taking any aggressive actions that do not have Democratic support,” Schwartz expounds.

Once those nominees are in place, Schwartz envisages some fundamental changes. “Ferguson has a longstanding view that the FTC’s in-house court system is unconstitutional. I expect him to take a close look at how that process works, which will likely hamstring the FTC from taking significant actions.” On the DoJ side, Schwartz foresees smaller shifts, noting that Slater is more of an institutionalist and will likely be working for an attorney general (nominee **Pamela Bondi**) who does not have well-developed views on antitrust. “This will stand in notable contrast to the DoJ at the end of the first Trump administration, where Attorney General **William Barr** had a well-established interest in antitrust issues,” Schwartz observes.

For Schwartz, the Slater appointment appears to be a “sound” decision that will serve to continue the DoJ’s current trajectory. However, Ferguson’s candidacy is a more open question. “On the one hand, Ferguson has supported certain aggressive FTC actions under President Biden, such as supporting the release of an unusual ‘interim’ study on the activities of pharmaceutical benefit managers. Ferguson has also excoriated [Big Tech](#) companies that allegedly engage in censorship, which others see as basic content moderation and curation,” Schwartz remarks. On the other hand, Ferguson has a longstanding view that the FTC is part of a “gargantuan” and unresponsive administrative

state, Schwartz continues, adding that it will be interesting to see how he reconciles these two views, and whether he tries to flex the FTC's powers against companies the Trump administration dislikes – or attempts to rein in the FTC and reduce its impact.

## BIG TECH AND FREE SPEECH

Dubrow asserts that Ferguson and Slater are both highly qualified to head the FTC and DoJ Antitrust Division, respectively, noting that Slater comes from a technology background and has served as a lawyer for an internet trade association, as well as being a technology policy adviser in the first Trump administration. “She seems pretty set up to keep the focus on issues around technology firms. I see a similar tech focus from Ferguson. I also believe Ferguson will be focused on reducing the regulatory burdens that the [previous FTC chair] **Lina Khan** imposed, where she took a broad view of the FTC's authority to regulate by rulemaking rather than case-by-case adjudication,” Dubrow says.

When it comes to Big Tech, both appointees, especially Ferguson, have indicated that they will be mindful of free speech considerations. “The idea that certain tech platforms have regulated content is something that Ferguson, in particular, has said he intends to scrutinise by using the competition laws,” Grannon comments. “This has not been typically high on the list of enforcement priorities for antitrust enforcers, so that is something new and we'll have to see how that plays out. Whether it's an investigation or a court case, my guess is it would start with an investigation.”

Schwartz expects Trump to mean what he said – that Big Tech will be an area of significant continued focus: “Many of the current litigations against large technology companies originated under the first Trump administration, such as the [FTC's investigation into Amazon](#).” However, he believes the term ‘Big Tech’ is likely to be defined very broadly to encompass a number of technology-based functions outside of the large companies, and the FTC's study into so-called surveillance pricing, products that use personal data, including finances and browser history, to set individualised prices for the same goods or services, will be one to watch, especially as Ferguson initially supported it. Another area that could receive scrutiny is health information technology, which has a long history of bipartisan concern around potential misconduct by dominant companies, such as information blocking, Schwartz predicts.

## HEALTHCARE ACTIONS



**Justin Murphy**, partner and leader of **BakerHostetler**'s cartel and government antitrust investigations task force in Washington, DC agrees that healthcare will be a top priority: "The Trump-led DoJ and FTC were active in the healthcare space, which included challenging healthcare-related transactions, but also bringing a variety of significant civil and criminal enforcement actions," he explains, adding that two new antitrust-related enforcement tools were brought to bear this past year that specifically target this industry, including "a DoJ task force on healthcare monopolies and collusion".

The growing scrutiny of large vertically integrated health systems will likely continue, according to Dubrow, who notes that the antitrust agencies have been concerned about the impacts of consolidation within the insurance, hospitals, physician and pharmacy benefits sectors. "Healthcare is a huge part of federal spending and impacts everyone, both from a cost standpoint as well as quality of care."

Outside of Big Tech, Swisher imagines enforcement will be fairly ecumenical in terms of industry sectors. "Aggressive antitrust enforcement has bipartisan support, and while we may see some changes at the margins, I expect we will see plenty of cases in a variety of industries."

## PROCUREMENT CRACKDOWNS

Murphy expects procurement to come under the antitrust microscope through the Procurement Collusion Strike Force, launched during the first administration to combat antitrust crimes and related schemes in government procurement, which "has been an extremely successful initiative for the DoJ, and I expect that to continue to get attention and resources from the administration and be pressed forward".

A continued emphasis on cartel matters is anticipated, while Swisher expects merger enforcement to be substantively more economics-focused and procedurally more in line with historical norms compared to what has been witnessed over the last four years. The fate of the [new Hart-Scott-Rodino\(HSR\) merger rules](#) and the 2023 Merger Guidelines could be up in the air, while the recently rescinded Competitor Collaboration Guidelines could be reinstated, Swisher adds.

## ONE AGENCY ACT



On 14 February, Representative **Ben Cline** reintroduced the One Agency Act to Congress, saying: “For far too long, our antitrust enforcement has been plagued by bureaucratic infighting and delays that hinder competition.” The Bill would reassign the FTC’s antitrust responsibilities to the DoJ Antitrust Division, leaving the FTC only a consumer protection role. Dubrow says having two agencies with overlapping mandates may make this a target for the Elon Musk and Vivek Ramaswamy-led Department of Government Efficiency (DOGE).

“I could [also] see Ferguson supporting it, and that would be a very big change,” Grannon says. “It would actually affect enforcement a lot because the FTC has always had that little buffer of extra independence because of the way it’s structured. And now you could see antitrust enforcement completely under the head of the Antitrust Division, which is a presidential appointee who serves at the pleasure of the President and can be fired without cause,” he adds.

However, Murphy is less convinced that the FTC will be subsumed into the DoJ. “It would be a substantial undertaking and involve a remarkable upheaval to try and make that happen. Second, Trump nominated his chair for the FTC quite early on, and he will want to utilise the FTC and its investigative and enforcement powers to further his administration’s agenda,” Murphy says.

As for what major antitrust cases may be on the agenda, Schwartz says the industry will probably have to wait two-to-three years for any big homegrown cases under the new administration. “That said, if I was a tech company that engaged in heavy content moderation practices, I would likely be looking for good antitrust lawyers now,” Schwartz concludes.

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